In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division

In the matter of:	)	
	)	Adversary Proceeding
DAVID A. JOHNSON, JR.	)	
(Chapter 7 Case Number 96-40938)	)	Number 98-4117
	)	
Debtor	)	
	)	
	)	
	)	
FIRST FRANKLIN FINANCIAL	)	
	)	
Plaintiff	)	
	)	
	)	
v.	)	
	)	
DAVID A. JOHNSON, JR.	)	
	)	
Defendant	)	

MEMORANDUM AND ORDER

Debtor's case was filed under Chapter 13 on April 16, 1997, and was converted to a Chapter 7 case on February 20, 1998. Plaintiff filed this complaint alleging that the debt owed it by the Debtor is excepted from discharge by 11 U.S.C. § 523(a)(2) and (6). This Court held an evidentiary hearing on September 16, 1998. Based upon the applicable authorities and the evidence presented, I make the following Findings of Fact and Conclusions of Law.

Prior to filing his Chapter 13 case, on July 10, 1995, the Debtor borrowed money

from First Franklin Financial, pledging a 1984 Mazda and a 1975 18 foot Galaxy boat, motor and trailer as collateral. Debtor scheduled the Galaxy boat in both his chapter 13 and chapter 7 petition, valuing it at $2,100.00; however, Debtor did not schedule the 1984 Mazda in either instance. Debtor's Chapter 13 case provided for the payment of First Franklin's claim in full. The plan was confirmed and during the pendency of the case the Debtor made payments to the Chapter 13 Trustee, which were disbursed to First Franklin to reduce the outstanding indebtedness.

Following conversion of the case, because the Debtor had stated his intention to surrender the 1975 Galaxy boat, the creditor's representative came to the Debtor's residence in April of 1998 to inspect the collateral and to repossess it. Someone emerged from the Debtor's residence and objected to them removing the boat, claiming that the boat had been sold to a neighbor. The 1984 Mazda was not on the premises at the time the creditor's representative first visited, but ultimately the boat, motor and trailer were repossessed albeit in a poorer state of repair than at the time they were first inspected.

The 1984 Mazda truck was never recovered. Debtor's testimony was that the engine in the truck locked up, that it had 170,000 miles on it, that the condition was so poor that the Debtor decided not to attempt to repair it. However, Debtor failed to contact First Franklin and inform it of the condition of the collateral or to indicate his willingness that the collateral be repossessed. Instead, he had the vehicle towed to a junkyard by a third party and testified he received no consideration in return for the salvage.

CONCLUSIONS OF LAW

In an action to determine the nondischargeability of a debt, the plaintiff bears the burden of proving by a preponderance of the evidence that a discharge is not warranted. Grogan v. Garner, 498 U.S. 279, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991). While the underlying claim is determined by looking to state law, though, whether or not the debt is excepted from discharge is distinctly a matter of federal law governed by the terms of the Bankruptcy Code. Grogan, 498 U.S. at 284, 111 S.Ct. at 657-658 (*citing* Brown v. Felsen, 442 U.S. 127, 129-130, 136, 99 S.Ct. 2205, 2208-2209, 2211, 60 L.Ed.2d 767 (1979).)

First Franklin seeks a determination of dischargeability of the debt under Section 523(a)(2) and (6), which provide as follows:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt--
>
> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained, by--
>
> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;
>
> (B) use of a statement in writing--
>
> (i) that is materially false;
> (ii) respecting the debtor's or an insider's financial condition;
> (iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and
> (iv) that the debtor caused to be made or published with intent to deceive; or

> (C) for purposes of subparagraph (A) of this paragraph, consumer debts owed to a single creditor and aggregating more than $1,000 for "luxury goods or services" incurred by an individual debtor on or within 60 days before the order for relief under this title, or cash advances aggregating more than $1,000 that are extensions of consumer credit under an open end credit plan obtained by an individual debtor on or within 60 days before the order for relief under this title, are presumed to be nondischargeable; "luxury goods or services" do not include goods or services reasonably acquired for the support or maintenance of the debtor or a dependent of the debtor; an extension of consumer credit under an open end credit plan is to be defined for purposes of this subparagraph as it is defined in the Consumer Credit Protection Act.
>
> (6) for willful and malicious injury by the debtor to another entity or to the property of another entity;

As to the contentions of actual fraud, although there was some testimony concerning the original transaction, I find the evidence insufficient to carry the creditor's burden on the issue of whether the Debtor committed actual fraud as required by applicable authorities.

With respect to Section 523(a)(6), however, the creditor contends that the Debtor's act in disposing of the collateral without obtaining the permission of First Franklin constitutes a conversion amounting to willful and malicious injury, thus excepting the outstanding indebtedness from discharge. Debtor contends that under the recent Supreme Court decision, Kawaauhau v. Geiger, – U.S. – , 118 S.Ct. 974, 977, 140 L.Ed.2d 90 (1998), his actions are insufficient to constitute a willful and malicious injury. Debtor points to his specific circumstances, where the value of the collateral had been substantially reduced, if not completely eliminated, and where the Debtor received no consideration upon the sale of the collateral.

A debt will only be nondischargeable if it results from a deliberate and intentional injury, not merely a deliberate or intentional act that leads to injury. Kawaauhau v. Geiger, – U.S. – , 118 S.Ct. 974, 977, 140 L.Ed.2d 90 (1998). Debts excepted from discharge under Section 523(a)(6) are in the category of "intentional torts." Id. The unanimous Geiger Court, while narrowing the scope of Section 523(a)(6) in a medical malpractice case, specifically reaffirmed previous Supreme Court case law on conversion debts in bankruptcy. Id. at 978.

> [D]ecisions of this Court are in accord with our construction. In McIntyre v. Kavanaugh, 242 U.S. 138, 37 S.Ct. 38, 61 L.Ed. 205 (1916), a broker "deprived another of his property forever by deliberately disposing of it without semblance of authority." Id., at 141, 37 S.Ct., at 39. The Court held that this act constituted an intentional injury to property of another, bringing it within the discharge exception. But in Davis v. Aetna Acceptance Co., 293 U.S. 328, 55 S.Ct. 151, 79 L.Ed. 393 (1934), the Court explained that not every tort judgment for conversion is exempt from discharge. Negligent or reckless acts, the Court held, do not suffice to establish that a resulting injury is "willful and malicious." See id., at 332, 55 S.Ct., at 153.

Geiger, 118 S.Ct. at 978. Thus, if the interference with the secured party's rights in the collateral is found to be intentional, the conversion debt is excepted from discharge. *See* McIntyre, 37 S.Ct. at 39 (rejecting contention that liabilities for conversion were outside scope of predecessor to Section 523(a)(6)).

While not dispositive, this Court notes that the same result is obtained by looking to state law, under which conversion of another's property or interests in property is a tort for which punitive damages may be recovered. O.C.G.A. §§ 15-10-1, 15-10-6, 15-12-5.1; *see also* Privetera

v. Addison, 190 Ga. App. 102, 104, 378 S.E.2d 312, 315 (1989), *cert. denied*, (March 2, 1989). "Any distinct act of dominion wrongfully asserted over another's property in denial of his right or inconsistent with it is a conversion." Bromley v. Bromley, 106 Ga. App. 606, 610, 127 S.E.2d 836, 839-840 (1962). The value of property converted does not diminish a wronged party's right to seek damages for a willful conversion. *See* Norred v. Dispain, 119 Ga. App. 29, 32, 166 S.E.2d 38, 41 (1969) (defendant can not avoid liability for rental by unlawfully refusing to surrender possession of property to plaintiff and thus preventing property from being repaired and placed in rentable condition).

The crux of the matter is whether the debtor intended the consequences of the act, i.e., to deprive the creditor of its lawful exercise of rights in the collateral by disposing of the collateral without the creditor's knowledge or consent. *See* Geiger, 118 S.Ct. at 977 (*citing* Restatement (Second) of Torts § 8A, comment a, p.15 (1964)). I find that Debtor did in fact intend such a result. The fact that the truck, in Debtor's eyes, had little or no value does not excuse Debtor's intentional interference with the right of First Franklin to do what it wished with the collateral in which it held a legal interest.

ORDER

In light of the foregoing Findings of Fact and Conclusions of Law, it is hereby ordered that the debt owed to Farmers Furniture is excepted from discharge.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of December, 1998.